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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALAN ROSS CLUFF, Defendant and Appellant.	A086125 (San Mateo County Super. Ct. No. SC042021)
In re ALAN ROSS CLUFF on Habeas Corpus.	A090342

In a court trial, Alan Ross Cluff was convicted of failing to comply with the sexual offender registration scheme. (Pen. Code, § 290.)[1] In addition, the court found Cluff had suffered three prior "strikes" under the Three Strikes law and had served a prior prison term. Cluff's motion to strike the prior conviction allegations was denied, and "with a heavy heart" the court sentenced him to 25 years to life in prison.

This case involves the most technical violation of the section 290 registration requirement we have seen. Cluff registered with the chief of police in the jurisdiction where he was living, and continuously resided at the same address until his arrest on the current charge. Thus, he did not violate the requirement that he register after moving to a city or changing his "residence or location" within the city. (§ 290, subd. (a)(1)(A).)

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* Under California Rules of Court, rules 976(b) and 976.1, only the introductory statement, Part I, subpart G of Part II, and Part III are certified for publication.

1 Subsequent statutory references are to the Penal Code.

Instead, Cluff failed to comply with the separate requirement that he annually "update" his registration within five days his birthday. (§ 290, subd. (a)(1)(D).) The Legislature added an annual registration requirement in 1995, five years after Cluff was released from prison. It was Cluff's failure to annually confirm that his address had not changed that triggered his liability under section 290 and led to his 25-years-to-life prison term.

Cluff raises a total of 10 issues in this appeal and a consolidated petition for writ of habeas corpus. We reject the bulk of his arguments and affirm his conviction.

However, we conclude the trial court abused its discretion when it denied Cluff's motion to strike one or more of his priors. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).) Therefore, we vacate the sentence and remand for a new *Romero* hearing.

I

BACKGROUND

The registration requirement in this case stemmed from Cluff's convictions on nine counts of lewd and lascivious conduct with a child under the age of fourteen. Cluff was sentenced to a total term of nine years for those offenses. He was released from prison in 1990. At that time, prison officials informed him of his lifetime obligation to register as a sex offender. Cluff registered a number of times after changing his residence over the next five years. In October 1995, Cluff moved to the city of San Mateo. On October 18, 1995, he went to the San Mateo police department and registered as section 290 requires. The registering officers (Jacobson and Pierucci) interviewed Cluff, took his photograph and fingerprints, and listed his address, occupation, and other identifying information on the registration documents. Cluff gave his address as 1408 South Norfolk Street in San Mateo.

When Cluff registered in October 1995, Officer Jacobson gave him a form explaining the requirements for registration. Cluff signed the form, which specifically advised him that he was required to update his registration annually within (at that time) 10 days of his birthday. This was a new requirement that came into effect on January 1, 1995. It was not highlighted on the form, and Cluff did not receive a copy of the form.

However, it was Officer Jacobson's habit to orally summarize the registration requirements, including the requirement that the offender update his registration annually.[2]

Officer Jacobson gave Cluff a temporary "compliance receipt" that had a summary of the section 290 registration law printed on the back. However, the summary did *not* include the new requirement that the offender update his registration annually. Similarly, Cluff's fingerprint card prepared at the time of the October, 1995 registration, had a summary of the registration requirements printed on the back that did not mention the annual updating requirement.

Except for a four-month period in 1996 when Cluff was helping his sister relocate to Utah after her husband died, he continued to live as a renter at 1408 South Norfolk Street in San Mateo. While he was in Utah, Cluff made rent payments to keep his room in his landlord's house.

In October 1997, Sergeant Callagy of the San Mateo Police Department learned that Cluff had not updated his registration during the period around his birthday (July 29) in 1996 and 1997. On October 23, 1997, Callagy went to 1408 South Norfolk Street and met with Cluff's landlord. The landlord confirmed that Cluff still lived at that address, and said he would have Cluff call Callagy when he returned. Cluff called Callagy the next day, and offered to come in immediately. Callagy told Cluff he needed to come to the police station to register, but that he need not come in that day. Cluff asked whether he would be arrested. Callagy said no. They made an appointment for October 27th.

When Cluff arrived at the police station for his appointment on October 27, Sergeant Callagy immediately arrested him for violating section 290. After Callagy

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[2] Cluff offered evidence that the San Mateo Police Department had changed its registration practices since 1995. Currently, the department uses a form that sets out the individual requirements for registration and requires the offender to separately sign or initial each separate requirement.

In 1996, the Legislature shortened the updating period from within 10 to within 5 days of the offender's birthday.

advised Cluff of his *Miranda* rights, he asked Cluff if he knew he had to register annually with the police department. Cluff said he "understood his requirements to register." When Callagy asked him why he did not register, Cluff had no answer. When Cluff asked if he could register that day (October 27), Callagy said he could not, and would have to make a separate appointment to come back to update his registration. To Callagy's knowledge, Cluff had not done so by the time of trial in December 1998, although he had registered when he moved to Patterson, California sometime in the first part of 1998.

The District Attorney charged Cluff in a one-count information as follows: "On or about 10/23/1997, Alan Ross Cluff being a person required to register as a sex offender having been previously convicted, of PC section 288A . . . , did fail to register within the time limits provided, in violation of Penal Code section 290(a)(1), a felony."

The prosecution argued that Cluff violated section 290 by failing to comply with the annual "birthday" registration requirement. As the prosecutor put it, "[t]he issue is whether he knew that he had to register within the time limits annually on his birthday."

The defense argued that Cluff's "failure to re-register on his birthday was a negligent violation of the statute due to mistake of fact."

The court rendered its verdict in December 1998, observing that the evidence was insufficient to determine whether Cluff's failure to register was "negligent as opposed to intentional." However, the court ruled that Cluff received sufficient notice of the annual registration requirement to satisfy any due process concerns. The court found him guilty as charged.

At the sentencing hearing in February 1999, the court considered the probation officer's report, the report of a court-appointed psychotherapist, and the arguments of counsel, before denying Cluff's *Romero* motion and sentencing him to a term of 25 years to life.[3]

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3 Both reports considered at the February 1999 sentencing had been prepared in August 1998.

II

DISCUSSION

Cluff raises seven issues in this appeal and three additional issues in a consolidated habeas corpus petition.

A. Cluff Received Adequate Notice of the Charge.

Cluff first contends that, although he was charged with failing to "register" within the time limits section 290, subdivision (a)(1) provides, he was in fact convicted of failing to *update* his registration within the pertinent time limits. Cluff contends that failing to "register" and failing to annually "update" a registration are two distinct offenses, and charging one (failure to register) does not allow conviction of the other (failing to annually "update" registration). We reject this argument.

We may agree with Cluff that section 290, subdivision (a)(1), as it existed in 1997, made it a felony, inter alia, (1) to fail to register upon first moving into a jurisdiction; and (2) to fail to annually "update" that registration within a specified number of days of the registrant's birthday.[4] We may also agree that the evidence and the People's argument suggest Cluff was convicted for only the latter conduct.

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[4] The 1997 version of section 290 provided in pertinent part: "(a)(1) Every person described in paragraph (2), for the rest of his or her life while residing in California, shall be required to register with the chief of police of the city in which he or she is domiciled, or the sheriff of the county if he or she is domiciled in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California or the California State University if he or she is domiciled upon the campus or in any of its facilities, within [1] five working days of coming into any city, county, or city and county in which he or she temporarily resides or is domiciled for that length of time. No entity shall require a person to pay a fee or register or update his or her registration pursuant to this section. Beginning on his or her first birthday following registration or change of address, the person shall be required annually thereafter, within [2] five working days of his or her birthday, to update his or her registration with the entities described in this paragraph, including, verifying his or her name and address on a form as may be required by the Department of Justice. . . ." (Stats. 1997, ch. 821, § 3, p. 5.)

"(b) (1) Any person who, after August 1, 1950, is released, discharged, or paroled from a jail, state or federal prison, school, road camp, or other institution where he or she was confined because of the commission or attempted commission of one of the offenses specified in subdivision (a) or is released from a state hospital to which he or she was committed as a

Cluff contends further, however, that the information only charged him with failing to "register," not failing to "update" his registration. Moreover, he contends there is insufficient evidence to support a conviction for failing to "register" in the first instance, and, consequently, we must reverse his conviction for lack of evidence to support the charged offense. We disagree.

Cluff's argument puts the substantial evidence horse before the notice cart. That is, the argument assumes he had no notice he was being charged with failing to annually "update" his registration. This is a mistaken premise.

A defendant may be convicted of *any* offense charged in the information. "[T]he purpose of the charging document is to provide the defendant with notice of the offense charged. (§ 952.) The charges thus must contain in substance a statement that the accused has committed some public offense, and may be phrased in the words of the enactment describing the offense or in any other words sufficient to afford notice to the accused of the offense charged, so that he or she may have a reasonable opportunity to prepare and present a defense." (*People v. Bright* (1996) 12 Cal.4th 652, 670.)

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mentally disordered sex offender under Article 1 (commencing with Section 6300) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code, shall, prior to discharge, parole, or release, be informed of his or her duty to register under this section by the official in charge of the place of confinement or hospital, and the official shall require the person to read and sign any form that may be required by the Department of Justice, stating that the duty of the person to register under this section has been explained to the person. The official in charge of the place of confinement or hospital shall obtain the address where the person expects to reside upon his or her discharge, parole, or release and shall report the address to the Department of Justice.

(2) The official in charge of the place of confinement or hospital shall give one copy of the form to the person and shall send one copy to the Department of Justice and one copy to the appropriate law enforcement agency or agencies having jurisdiction over the place the person expects to reside upon discharge, parole, or release. If the conviction which makes the person subject to this section is a felony conviction, the official in charge shall, not later than 45 days prior to the scheduled release of the person, send one copy to the appropriate law enforcement agency or agencies having local jurisdiction where the person expects to reside upon discharge, parole or release; one copy to the prosecuting agency that prosecuted the person; and one copy to the Department of Justice. The official in charge of the place of confinement shall retain one copy." (Stats. 1997, ch. 821, § 3, pp. 7-8.)

The principal issue is whether the information described the pertinent offense (failing to annually "update" a registration) in "words sufficient to afford notice to [Cluff] of the offense charged, so that he . . . [had] a reasonable opportunity to prepare and present a defense."

It is true, as Cluff points out, that the information did not charge him with failing to annually "update" his registration in so many words. Rather, the information charged him more generally with failing "to register within the time limits provided, in violation of Penal Code section 290(a)(1), a felony." However, as it read in 1997, section 290, subdivision (a)(1) *included* the requirement that a registrant annually update his or her registration. The section provided: "Every person [convicted of certain offenses], for the rest of his or her life while residing in California, shall be required to register with the chief of police of the city in which he or she is domiciled . . . within five working days of coming into any city. . . . [T]he person shall be required annually thereafter, within five working days of his or her birthday, to update his or her registration with the [chief of police], including, verifying his or her name and address on a form as may be required by the Department of Justice." (Stats. 1997, ch. 821, § 3, p. 5.)

In our view, the information was broad enough to charge Cluff with both theories of violating section 290, subdivision (a)(1). Thus, it is more accurate to say the information charged Cluff with a single offense that could be committed in two different ways: by failing to register in the first instance, or by failing to annually "update" the registration. In light of this, Cluff's complaint is really that the information was misleading because it charged him with failing to register, rather than specifically with failing to update his registration.[5]

However, "a defendant can be adequately notified of the nature and cause of the accusation against him by means other than the charging document." (*Calderon v.*

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[5] To the extent Cluff believed the information itself was too vague to give notice of the charge against him, he was required to demur to the information to preserve that issue on appeal. (§§ 1004, subd. 2; 1012; *People v. Jeff* (1988) 204 Cal.App.3d 309, 342.) He failed to do so.

Prunty (9th Cir. 1995) 59 F.3d 1005, 1009, citing *Sheppard v. Rees* (9th Cir. 1989) 909 F.2d 1234, 1236, fn. 2; and *Morrison v. Estelle* (9th Cir. 1992) 981 F.2d 425, 428.) Here, the prosecutor clearly indicated in her opening statement that she was principally charging Cluff with failing to annually update his registration.[6] This was sufficient to put him on notice that this was the theory the prosecutor was relying on.[7] (See *Calderon v. Prunty, supra,* 59 F.3d at p. 1009 [prosecutor's opening statement sufficient to put defendant on notice that the prosecutor was proceeding on lying in wait theory].)

Moreover, this was not a case where the prosecution affirmatively misled or ambushed Cluff. As the court observed in *Calderon v. Borg* (N.D. Cal. 1994) 857 F.Supp. 720, 722-723 (reviewed in *Calderon v. Prunty*, *supra*, 59 F.3d at p. 1010): "Adequate notice [of a theory of criminal liability] can be given to a defendant by means other than the indictment itself. . . . The record of each case must be examined to determine whether a defendant received constitutionally adequate notice. And the adequacy of the notice is measured by whether the government's conduct misled the defendant and thereby denied him an effective opportunity to defend himself. That is in effect an ambush rule."

Here, it was always clear that the prosecutor would be trying to convict Cluff of failing to annually "update" his registration. Consequently, Cluff received

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6 Among other things, the prosecutor stated: "The People believe the evidence will show . . . that the defendant is in violation of Penal Code section 290, subsection [(a)(1)] in that he was convicted of an offense that required sex registration; that he registered previously for a period of years, *and then completely ignored his duty to register when he was aware he had a duty to register every single year within ten working days . . . of his birthdate*."

7 The California cases suggest that the defendant receives notice of the charges against him through a combination of the charging document and the preliminary hearing. "The information plays a limited but important role — it tells a defendant what kinds of offenses he is charged with and states the number of offenses that can result in prosecution. However, the time, place, and circumstances of charged offenses are left to the preliminary hearing transcript. This is the touchstone of due process notice to a defendant." (*People v. Gordon* (1985) 165 Cal.App.3d 839, 870-871 (conc. opn. of Sims, J.), disapproved on other grounds in *People v. Lopez* (1998) 19 Cal.4th 282, 292 and *People v. Frazer* (1999) 21 Cal.4th 737, 765; see also *People v. Jeff*, *supra*, 204 Cal.App.3d 309, 342.) Here, however, Cluff voluntarily waived his right to a preliminary hearing and thus did not avail himself of that procedural protection.

constitutionally adequate notice that he could be convicted of failing to annually update his registration. Since substantial evidence supports that theory, the conviction must stand.

B. The People Were not Required to Prove that Cluff Received Notice of the Registration Requirement When he was Released from Prison.

Cluff next contends the prosecution was required to prove that the appropriate officials informed him of his duty to register and to "update" his registration *at the time he was released from prison*. Section 290 provides that a person required to register under that section "shall, prior to discharge, parole, or release, be informed of his or her duty to register under this section by the official in charge of the place of confinement or hospital, and the official shall require the person to read and sign any form that may be required by the Department of Justice, stating that the duty of the person to register under this section has been explained to the person . . . [¶] (2) The official in charge of the place of confinement or hospital shall give one copy of the form to the person . . . ." (§ 290, subd. (b)(1) & (b)(2).)[8] In essence, Cluff is claiming this procedure is an "element" of a section 290 offense that the prosecution must prove.[9]

Initially, we note Cluff's argument is nonsensical to the extent it suggests the prison officials had to inform him of his duty to "update" his registration annually when he was released from prison in 1990. As we have already pointed out, there was no such requirement in 1990, and it was not added until 1995. Thus, unless we are going to require prison officials to be prescient, it makes no sense to say they had a duty to inform Cluff of a duty that did not then exist.

We simply do not agree that this notification procedure is an "element" of a section 290 offense that the prosecution must prove in all cases. In arguing that the notice provision is a statutory element of a "failure to register" offense, Cluff cites *People*

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8 Although we quote from the 2000 version of section 290, we note both the 1990 and 1997 versions of the statute imposed a substantially identical requirement.

9 This issue is currently pending before our Supreme Court in *People v. Garcia* (1999) 73 Cal.App.4th 1099, review granted November 17, 1999.

v. Buford (1974) 42 Cal.App.3d 975, 982. In that case, Division One of this District reversed a trial court's order revoking probation that was based in part on the defendant's failure to register under section 290. The appellate court found there was no evidence "from which it could infer that either the court granting probation or the official in charge of the county jail complied with the requirements of section 290. The only evidence on this point was that [the defendant's] probation officer had been told by the Oakland Police Department that [the defendant] was not registered. [His probation officer] had never discussed with [him] whether or not he had registered, although the sentencing court clearly directed the probation officer to do so." (*Id.* at p. 987.) The court reasoned: "To revoke [the defendant's] probation for his noncompliance with section 290, while excusing the noncompliance of the sentencing court, the jail officials, and/or the probation officer constituted an abuse of discretion." (*Ibid*.)

Thus, *People v. Buford, supra*, 42 Cal.App.3d 975, does not hold, as Cluff suggests, that the notice requirement is a statutory element of a section 290 failure to register offense. It merely holds that under the circumstances of the case before it, the trial court abused its discretion by revoking probation where there was no proof of notice to the defendant. Indeed, the *Buford* court made it clear the trial court revoked the defendant's probation because he violated the terms of his probation, not because he committed a new offense. (42 Cal.App.3d at p. 985.) Thus, the *Buford* court had no cause to examine the elements of a section 290 failure to register offense.

Significantly, the Legislature has, on occasion, specifically provided a notice "defense" to section 290 violations where it thought it appropriate. Thus, in the current version of section 290 the statute specifically provides that persons who do not receive notice that the registration period has been shortened from 14 to 5 days can assert the lack of notice as a defense to failing to register within the shortened period. (§ 290 subd. (l)(2).) Thus, the Legislature knows how to make the notice requirement an element of the offense (or a least an affirmative defense) if it so chooses. The fact it failed to do so with the general notice requirement indicates it did not intend to make that requirement a statutory element of the offense.

C. There was Substantial Evidence Cluff Had Actual Notice of the Annual Registration Requirement.

Cluff next contends due process required the court to find he had actual (or at least "probable") knowledge of the annual "updating" requirement before he could be convicted of violating section 290. He further contends there was no evidence to support such a finding.

Cluff's due process/substantial evidence argument rests primarily on the United States Supreme Court decision in *Lambert v. California* (1957) 355 U.S. 225. In *Lambert* the high court considered a Los Angeles criminal ordinance that required all convicted felons to register with the chief of police within five days of coming into the city. (*Id*. at p. 226.) The ordinance had no notice provision and the defendant in *Lambert* claimed she was unaware of the registration requirement. In finding the ordinance violated due process as applied to Lambert, the Supreme Court reasoned:

"We must assume that [Lambert] had no actual knowledge of the requirement that she register under this ordinance, as she offered proof of this defense, which was refused. The question is whether a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge.

"[W]e deal here with conduct that is wholly passive—mere failure to register. It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed. [Citations.] The rule that 'ignorance of the law will not excuse' [citation] is deep in our law, as is the principle that of all the powers of local government, the police power is 'one of the least limitable.' [Citation.] On the other hand, due process places some limits on its exercise. Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. . . .

"Registration laws are common and their range is wide. [Citations.] Many such laws are akin to licensing statutes in that they pertain to the regulation of business activities. But the present ordinance is entirely different. Violation of its provisions is unaccompanied by any activity whatever, mere presence in the city being the test. Moreover, circumstances which might move one to inquire as to the necessity of registration are completely lacking. . . . [T]his appellant on first becoming aware of her duty to register was given no opportunity to comply with the law and avoid its penalty, even though her default was entirely innocent. She could but suffer the consequences of the ordinance, namely, conviction with the imposition of heavy criminal penalties thereunder. We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand. . . . Where a person did not know of the duty to register, and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process." (*Lambert v. California, supra,* 355 U.S. at pp. 227-230.)

Unlike *Lambert,* in the case before us, the court found that the notice of the annual registration requirement Cluff received in October of 1995 was sufficient to satisfy any due process concerns. Thus, here there was "proof of the probability" that Cluff had knowledge of the annual registration requirement, as *Lambert* requires. In other words, this is a case where Cluff failed "to act under circumstances that should [have] alert[ed] [him] to the consequences of his deed." (355 U.S. at p. 228 [78 S.Ct. at p. 243].) Thus, there is no due process violation under *Lambert*. (See *Griffin v. Wisconsin* (1987) 483 U.S. 868, 875, fn. 3 [107 S.Ct. 3164, 3169, 97 L.Ed.2d 709]; *Texaco Inc. v. Short* (1982) 454 U.S. 516, 546-548 [102 S.Ct. 781, 801, 70 L.Ed.2d 738] [describing *Lambert* as involving "the necessity of notice in the context of a registration statute sufficiently unusual in character, and triggered in circumstances so commonplace, that an average citizen would have no reason to regard the triggering event as calling for a heightened awareness of one's legal obligations"]; *U.S. v. Wilson* (7th Cir. 1998) 159 F.3d 280, 288

[discussing maxim that "ignorance of the law is no excuse" and summarizing *Lambert's* holding as "notice required when penalty may be exacted for failing to act"].)

Cluff's substantial evidence argument on this point is unavailing. The evidence shows that, at the time Cluff registered in October of 1995, Officer Jacobson gave him a form explaining the then-current requirements for registration. The form specifically advised Cluff that he was required to update his registration annually within (at that time) 10 days of his birthday. Although this new requirement was not highlighted in the form and Cluff did not get a copy of the form, Officer Jacobson testified it was his "habit" to orally summarize the registration requirements, including the requirement that the offender update his registration annually. The trial court specifically found the written notice Cluff received in 1995 was "unambiguous." "There is nothing confusing about it. And the defendant signed it[,] reflecting . . . some level of understanding of the requirement, including the requirement to register annually within ten days of his . . . birthday. [¶] Consequently, I am simply not convinced based on the evidence that I have heard that the defendant did not know of his requirement. [¶] In fact, I am satisfied he did have awareness of the date during the years in question. . . ." Clearly, there was substantial evidence Cluff had actual notice, and thus probable knowledge, of the annual registration requirement.

Cluff essentially reargues the evidence on this point, which he may not do on appeal. (*People v. Cortes* (1999) 71 Cal.App.4th 62, 81.) Moreover, we reject Cluff's suggestion that the police violated his due process rights by showing him one form (which might be described as the primary form) that contained the annual registration requirement, while the other forms he received omitted that requirement. As the court observed, the written notice Cluff signed was "unambiguous" on this point. The other notices did not contradict the primary form, but only omitted the additional requirement.

D. The Date Restriction in the Information.

The information charged that "on or about 10/23/97" Cluff "did fail to register within the time limits provided, in violation of Penal Code section 290(a)(1) . . . ." Cluff

construes this to mean he had a duty to update his "birthday" registration on October 23, 1997. However, since his birthday fell on July 29, Cluff claims he had no such duty, since October 23 did not fall "on or about" 10 days of that date.

Arguably, this contention fails because it rests on the flawed assumption that Cluff was charged with failing to register on or about October 23, 1997. However, the information stated that on or about October 23, 1997, Cluff had failed to register "within the time limits provided" in section 290. In other words, the charging document indicates Cluff was in violation of section 290 on or about October 23, 1997, because he had failed to register at some undisclosed time in the past.

But even ignoring this, our Supreme Court has held that failure to register under section 290 is a continuing offense, with each day bringing a new violation. (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 528 ["A defendant does not commit the crime only at the particular moment the obligation arises, but every day it remains unsatisfied"].) Since it was a continuing offense, Cluff *did* commit it "on or about" October 23, 1997, as well as every day he failed to register. Although Cluff disagrees with *Wright's* holding, he acknowledges it is binding upon us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

E. Self-Incrimination Argument.

Cluff next contends that, if a failure to register is indeed a continuing offense as *Wright* holds, then he had a complete defense to the charge of failing to update his registration "on or about October 23, 1997." This is because, if he did register on that date, he would have incriminated himself by in effect informing the police that he had *not* updated his registration within 10 days of his July 29th birthday, as he was required to do. Cluff claims his defense counsel was ineffective for failing to raise this argument.

This case is unlike *Marchetti v. United States* (1968) 390 U.S. 39, which Cluff relies on. There, the high court considered a federal tax statute that required those whose occupation was "wagering" (i.e. gambling) to provide detailed information to the Internal Revenue Service concerning those activities. Noting that "[w]agering and its ancillary

activities are very widely prohibited under both federal and state law" (*id*. at p. 44), the high court concluded the statutory registration scheme "created for petitioner [who lived in a state where gambling was illegal] 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination." (*Id.* at p. 48.) The court observed that, "[u]nlike the income tax return in question in *United States v. Sullivan*, 274 U.S. 259, every portion of these requirements had the direct and unmistakable consequence of incriminating petitioner; the application of the constitutional privilege to the entire registration procedure was in this instance neither 'extreme' nor 'extravagant.' " (*Marchetti, supra,* 390 U.S. at p. 48-49.)

In a companion case, *Grosso v. United States* (1968) 390 U.S. 62, 67, the Supreme Court considered whether forcing a citizen to comply with a similar registration and taxation scheme regarding wagering would violate that person's right not to incriminate himself. Once again the court reasoned that the citizen's "submission of an excise tax payment, and his replies to the questions on the attendant return [regarding wagering income], would directly and unavoidably have served to incriminate him; his claim of privilege as to the entire tax payment procedure was therefore neither 'extreme' nor 'extravagant.' " (*Id*. at p. 67.)

By contrast, the mere act of "updating" a prior registration does not create a "real and appreciable" as opposed to an "imaginary and unsubstantial," hazard of self-incrimination. Nor does it "directly and unavoidably [serve] to incriminate him." Indeed, the act adds nothing to what the police already know: that Cluff failed to update his registration within 10 days of his birthday.

Moreover, taken to its extreme, Cluff's argument leads to the absurd conclusion that a sex offender, by failing to annually update his registration within the time limits provided in "year one," can avoid the "updating" requirement for the period of the statute of limitations on the first offense. In other words, he can wait until the 10th (now 5th) day following his birthday, assert his Fifth Amendment privilege, refuse to update his registration, and not suffer any legal consequences (other than for the first violation)

while he still might be convicted of that original offense. Given that our Supreme Court has concluded section 290 defines a continuing offense, this cannot be the law.

In other words, the application of the constitutional privilege to the annual "updating" procedure would be "extreme" and "extravagant." (*Marchetti*, *supra*, 390 U.S. at p. 49.) We therefore reject Cluff's ineffective assistance argument. Competent trial counsel was not required to raise this imaginative Fifth Amendment argument.

F. The "Dual Use" of a Prior Conviction.

Cluff next contends the trial court impermissibly used his prior child molestation convictions both as an element of the section 290 violation and as a "strike" which enhanced his sentence under the Three Strikes law. He claims this dual use violated the rule of *People v. Edwards* (1976) 18 Cal.3d 796 and *In re Shull* (1944) 23 Cal.2d 745 "that when a prior conviction constitutes an element of criminal conduct which otherwise would be noncriminal, the minimum sentence may not be increased because of the indispensable prior conviction." (18 Cal.3d at p. 800.)

People v. Tillman (1999) 73 Cal.App.4th 771 (review denied November 10, 1999) exhaustively discussed and rejected this precise argument. The *Tillman* court noted several cases had already rejected the argument that a single prior conviction may not be used both to establish an element of the charged offense and to constitute a "strike." (*People v. Yarborough* (1998) 65 Cal.App.4th 1417, 1419-1421; *People v. Nobleton* (1995) 38 Cal.App.4th 76, 80-84; *People v. Sipe* (1995) 36 Cal.App.4th 468, 484-489.) Although the *Tillman* court was not persuaded by the reasoning of those cases (73 Cal.App.4th at p. 778), *Tillman* observed the *Edwards* rule was one "intended to effectuate legislative intent" and that the Legislative intent underlying the Three Strikes law effectively overrode the *Edwards* rule. (*Id*. at pp. 781-782.)

The *Tillman* court reasoned: "The intent behind the enactment of the Three Strikes law was clearly stated by the electorate. According to the statement of intent contained in the initiative measure by which section 1170.12 was adopted, ' "It is the intent of the People of the State of California in enacting this measure to ensure longer prison

sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." ' [Citations.] Section 1170.12, subdivision (d)(1), provides: 'Notwithstanding any other provision of law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in this section.' Construing the similar language of section 667, subdivision (f)(1), *Sipe, supra,* 36 Cal.App.4th 468 concluded that '[t]his absolute language permits only the interpretation that the Legislature intended more severe punishment for recidivist felons, regardless of whether a prior conviction is a component of their current felony.' (*Id.* at p. 489.) Additionally, section 1170.12, subdivision (c), states that its provisions for calculating sentences shall apply 'in addition to any other enhancements or punishment provisions which may apply.' These provisions demonstrate a broad intent to have the Three Strikes law apply to all recidivists coming within its terms. This intent would be frustrated by allowing the *Edwards* rule to limit the prior convictions that could be used to trigger application of the Three Strikes law." (73 Cal.App.4th at pp. 781-782.)

We agree with *Tillman's* reasoning and follow that case.[10]

G. Denial of the Motion to Strike.

Although Cluff casts his argument as a challenge to the constitutionality of his punishment, he actually argues two related points: (1) his sentence is unconstitutional because it is so disproportionate to his conduct that it "shocks the conscience and offends fundamental notions of human dignity" (*In re Lynch* (1972) 8 Cal.3d 410, 424); and (2) the court abused its discretion by not recognizing this, and failing to strike one or more of the prior convictions.

We note Cluff received his 25-years-to-life term not for the current offense alone, but because he had committed prior serious or violent felonies. (*People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630.) He is being punished for his recidivism, not merely for the

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10 Although the Supreme Court denied review in *Tillman*, this issue is presumably pending before the Supreme Court in *People v. Garcia, supra*, 73 Cal.App.4th 1099, since that case adopted *Tillman's* reasoning in the unpublished part of the opinion.

current offense. Other courts have determined that, as a general matter, the punishment imposed by California's Three Strikes law is not so disproportionate that it violates the prohibition against cruel or unusual punishment. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1512-1517 [citing cases].) Thus, we need not revisit that issue.

However, we conclude the court abused its discretion at the *Romero* hearing, because substantial evidence does not support the critical inference the court relied on in denying the motion to strike. Since we will vacate the sentence, we need not consider Cluff's arguments that the punishment is cruel and unusual.

1. Governing Law

The Supreme Court has set out guidelines for lower courts to apply in deciding whether to strike a prior Three Strikes conviction under *Romero*. The touchstone for that determination is whether "in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161*; People v. Garcia* (1999) 20 Cal.4th 490, 498; *People v. Stone* (1999) 75 Cal.App.4th 707, 717.)

Our Supreme Court has also made it clear that appellate review of a trial court's decision on a *Romero* motion is not de novo. " '[T]he superior court's order [i]s subject to review for *abuse of discretion*. This standard is *deferential*. [Citations.] But it is not empty. Although variously phrased in various decisions [citation], it asks in substance whether the ruling in question "*falls outside the bounds of reason*" under the applicable law and the relevant facts [citations].' " (*People v. Garcia, supra*, 20 Cal.4th at p. 503, italics in original, quoting *People v. Williams, supra*, 17 Cal.4th at p. 162.

Generally, sound discretion "is compatible only with decisions 'controlled by sound principles of law, . . . free from partiality, not swayed by sympathy or warped by prejudice . . . .' [Citation.]" (*People v. Bolton* (1979) 23 Cal.3d 208, 216.) " '[A]ll

exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' " (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977; see also *People v. Stone*, *supra*, 75 Cal.App.4th 707, 716; *People v. Myers* (1999) 69 Cal.App.4th 305, 309.)

A trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence. As the court noted in *Stack v. Stack* (1961) 189 Cal.App.2d 357, 368, italics omitted, "[i]t would seem obvious that, if there were no evidence to support the decision, there would be an abuse of discretion." In *Johns v. City of Los Angeles* (1978) 78 Cal.App.3d 983, the Second District found the trial court had abused its discretion in ordering a new trial because substantial evidence did not support the stated basis for the decision (juror bias). (*Id*. at pp. 990, 991-998; see also *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1065-1066 [discussing relationship between substantial evidence and abuse of discretion standards]; *People v. Benevides* (1998) 64 Cal.App.4th 728, 735, fn. 7 [court may not decline to exercise its authority to strike prior convictions under *Romero* for "improper reasons"].)

2. Facts Relevant to the Motion to Strike

Cluff was born in 1951 and was 48 years old at the time of sentencing. His early criminal history consists of a petty theft in 1970, two convictions for indecent exposure in 1972, and a third conviction for indecent exposure in 1973. In all three indecent exposure offenses Cluff exposed his penis to children in public areas.

In June 1984, a jury convicted Cluff of the felony counts of child molestation that underlie the Three Strikes enhancement in this case. With respect to those offenses, the probation report states that while Cluff was residing with his fiancée and two boys (aged five and eight), he frequently molested the boys by fondling their penises and orally copulating the younger boy. In a separate incident in the summer of 1983, Cluff molested the six-year-old son of a visiting friend by asking him to play "milk the cow." When the boy refused, Cluff pulled the boy's pants down and fondled the boy's penis. Cluff also molested a 7-year-old boy in a similar manner. Cluff received a nine-year

prison sentence for these offenses. He was paroled in April 1990. He was not arrested or accused of any further offense until October 1997, when the police arrested him for the registration violation at issue in this case. The court found Cluff guilty in December 1998, and sentenced him in February 1999.

With respect to Cluff's "prospects," he regularly worked as an electrician from 1995 to 1998 and, immediately before he was sent to prison, worked as a warehouse and maintenance person with a firm in Patterson, California. The court-appointed psychologist who examined Cluff in July and August 1998, Dr. Bruce Bess, concluded that Cluff had not reoffended since his release from prison, and would probably not reoffend "[w]ith probation supervision and participation in a treatment program."

With respect to the circumstances of the current offense, Dr. Bess stated in recommending probation that "[i]t is not clear why [Cluff] failed to renew his registration, but, to my knowledge, there is no indication that he was attempting to conceal his whereabouts." The probation officer took a dimmer view of the matter, noting that Cluff continued to maintain he was never notified of his duty to register, despite the documents he received informing him of that duty. The probation officer also noted: "On July 31, 1998, the defendant completed an application for enrollment through the OICW Program. He furnished a San Mateo address. This was after [he] register[ed] in Patterson, California. In his application, he reported no prior criminal convictions." The probation officer further observed that Cluff "did not mention having worked for a carnival as reported by his living companions. When confronted during the interview, [Cluff] reported that he did that type of work on a seasonal basis and was employed as an electrician."

Both Dr. Bess' report and the probation report were considered by the court on August 20, 1998, at a hearing on the prosecution's motion to increase Cluff's bail. The doctor's report was dated August 19; the probation report was dated August 20. The probation report stated that Cluff had been working for a firm in Patterson for "approximately five months." Anthony Costa, Cluff's landlord, testified at trial in December 1998 that from the previous May through August, Cluff (and Costa) had lived

part of the time with Costa's daughter in Patterson. Costa and Cluff travelled back and forth between San Mateo and Patterson, where Cluff worked for a business owned by Costa's daughter. At the bail hearing in August, Cluff's bail was increased and he was taken into custody, where he remained until sentencing.

The probation report was re-submitted to the court without change for the sentencing hearing in February 1999. At the hearing, the prosecutor contended Cluff was a pedophile who took work at a carnival and left the state without notifying anyone. Arguing beyond the evidence, the prosecutor asserted that Cluff lived with a family with three young boys.[11] The prosecutor suggested that Cluff may have reoffended but simply not been caught. The trial court rejected the prosecutor's insinuations, stating that it would be "improper for the court to speculate about crimes that may have occurred." However, the court also took a jaundiced view of Cluff's current offense. In denying Cluff's motion to strike his priors, the court stated:

"Well, I think from the court's p[er]spective, the circumstances underlying the offense at hand are important. [¶] And, in fact, it's very important as far as the consideration of the *Romero* motion. My read of Dr. Bess' report is that he makes a recommendation, there were some important factors he was aware about from [the] People's brief and some of the evidence that was introduced during the course of the trial regarding the defendant's conduct in this case, and he puts a very rosy p[er]spective on his alleged innocence in failing to register.

"And I don't buy that based on what I have heard about the conduct. It is not as simple as an innocent mistake. It's not as simple as he didn't know about his requirement.

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11 The only indication in the record that Cluff was living in a home with children is on a post-it note affixed to page two of Dr. Bess' report, bearing the notation "living in Patterson w/ Costa family w/ young children male children." The note is not dated, its source is not identified, and we cannot tell when or by whom it was attached. Clearly, an anonymous handwritten note of indeterminate origin appended to a formal written report is not evidence.

"There are disturbing factors underlying this case that I find alarming, in the court's view, which bear on the *Romero* issue that [defense counsel] has raised.

"The registration in 1998 in Patterson when there is documentation in the record that suggests misrepresentation as [to] his criminal background, his representation as to his place of residence.

"Yes, there is a contorted set of facts by which there can be some explanation of that, but frankly it's not compelling to me, not convincing me.

"And for those reasons, I disagree that this is a simple technical 290 violation. It's a violation that the defendant was advised of; that the defendant knew about, and his background is what it is.

"You are quite right, [defense counsel], there is no indication or evidence of reoffense. . . . That's not what's involved. He hasn't fled the jurisdiction of the court. Nevertheless, he has certainly, in the court's view, [clouded] the waters in terms of his residence and where he lives and where he can be found.

"The final and most significant portion of which was his failing to register as required by the code. Given the totality of factors, and I have given this a great deal of thought, Dr. Bess' report is important as well, I do not think that there [is] sufficient justification presented to me to strike the priors contained in the information regardless of Dr. Bess' [recommendation]. I am satisfied that based on what I have heard about this case, that there has been obfuscation on the part of Mr. Cluff that goes beyond the technical 290 violation.

"And given that circumstance, and the totality of the circumstances in the case, which cannot be ignored in the *Romero* motion, I am going to deny your request to strike the prior convictions under *Romero* for the reasons that I stated."

3. Analysis

This record strongly suggests that Cluff committed a "technical" violation of section 290, without intent to deceive or evade law enforcement. Though he failed to annually update his registration in San Mateo, Cluff consistently registered in the

jurisdictions where he resided.[12] The annual updating requirement was added to the Penal Code five years after Cluff left prison, the new requirement was omitted from the only document he was allowed to keep in 1995 when he registered in San Mateo, and the updating requirement was itself amended in 1996. When the police looked for Cluff, he was living at his registered address. After the police contacted Cluff, he immediately telephoned them and promptly came to the station.

Thus, Cluff's *Romero* motion did not lack substantial grounds on which the trial court might have exercised its discretion to strike one or more strikes. Cluff's failure to confirm his address, by itself, posed no danger to society. Cluff was exactly where he said he would be when he registered in 1995, and the police were able to quickly find him. The purpose of the registration statute was not undermined by his failure to annually update his registration. There was no indication he had reoffended since he left prison in 1990, and Dr. Bess believed that "with probation supervision and participation in a treatment program" Cluff would not reoffend.

However, the court viewed Cluff with suspicion, believing he had "[clouded] the waters in terms of his residence and where he lives and where he can be found." Apparently, the court was referring to the fact that Cluff had left the state for four months to stay with his recently widowed sister in Utah, without reporting this to the authorities. Similarly, the court seemed to give considerable weight to Cluff's misstatements in July 1998 regarding his residence and criminal record on his application for a job training program. Viewing the evidence as a whole, the court concluded "there has been obfuscation on the part of Mr. Cluff that goes beyond the technical 290 violation." The evidence in the record does not support this critical finding.

To be sufficient, evidence must be "substantial." (See, e.g., *People v. Morris* (1988) 46 Cal.3d 1, 19, disapproved on an unrelated point in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.) Evidence is substantial only if it " 'reasonably inspires

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12 Sgt. Callagy testified that Cluff had registered five times with various law enforcement agencies between his release from prison in 1990 and his 1995 registration in San Mateo.

confidence and is of "solid value." ' " (*People v. Morris*, *supra*, at p. 19.) By definition, "substantial evidence" requires *evidence* and not mere speculation. In any given case, one "may *speculate* about any number of scenarios that may have occurred . . . . A reasonable inference, however, may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence." (*Id*. at p. 21, italics in original, internal quotation marks omitted; see also *People v. Tran* (1996) 47 Cal.App.4th 759, 772.)

In this case, the trial court's analysis became disconnected from the evidence and entered the realm of imagination, speculation, supposition, and guesswork. At trial, the court had refrained from determining whether Cluff's registration violation was negligent or intentional. At the sentencing hearing, however, the court resolved its earlier doubts and concluded that Cluff had not inadvertently failed to annually update his registration, but had done so with knowledge of the requirement in order to "obfuscate" his true residence. We accept the trial court's finding that the violation was intentional (as we would have if the court had made that finding at trial); the evidence that Cluff had notice of the new requirement supports that determination. However, none of the facts before the court — whether considered separately or together — support the inference that Cluff failed to update his registration in order to obfuscate his residence or escape the reach of law enforcement.

Cluff's four-month visit with his sister in Utah does not indicate he was obfuscating his true residence in California. The term "residence" in section 290 connotes "more than passing through or presence for a limited visit[]." (*People v. McCleod* (1997) 55 Cal.App.4th 1205, 1218.) The People have not contended that the Utah interlude amounted to a change of residence. Had they believed so, they could have charged Cluff under section 290, subdivision (f) with failing to inform the police of a change of residence. The fact that no such charge was made is an implicit concession that Cluff did not change his residence.

Cluff's misrepresentations on a job training application seven months after his arrest also provide no grounds to infer that he intended to obfuscate his true residence. There is no evidence that Cluff ever changed his residence without re-registering. When the police looked for him, they found him at his registered address: 1408 South Norfolk Street in San Mateo. When Cluff gave a San Mateo address on his job training application in July 1998, he had already registered pursuant to section 290 in Patterson (therefore, the police could also have located him in that location). (See Pen. Code, § 290, subd. (a)(1)(B) [person with more than one residence must register at each].) Cluff omitted his criminal record, and apparently his current employment, on the application. However, the deceptive statements on the application prove only that he was willing to bend the truth to get into a job training program. Willingness to lie for a chance of employment may be an unfortunate trait possessed by many people in substantially less challenging circumstances than Cluff, but it does not support an inference that the applicant purposefully failed to update his sex offender registration in order to conceal his true residence. Cluff's address was on record with the appropriate authorities everywhere he resided. Under these circumstances, his statements on the job training application simply do not support the inference drawn by the trial court.

Similarly, Cluff's failure to report his employment with a carnival on a seasonal basis does not suggest obfuscation of his true residence. There is no evidence in the record indicating that Cluff traveled with the carnival, or, if he did, how long or how often he was gone. Thus, any inference of wrongdoing based on this evidence was unfounded.

Finally, the trial court found it "most significant" that Cluff had failed to annually update his registration as required by section 290. This is no more than a finding that he was guilty of the crime for which he was convicted. We do not see how the mere fact of Cluff's guilt indicates he failed to annually update his registration in order to obfuscate his true residence.

We conclude that the evidence in the record does not support the inference of obfuscation that was central to the trial court's ruling. Therefore, the court abused its discretion when it denied Cluff's *Romero* motion.

In light of our conclusion, we need not and do not resolve the claim that application of the Three Strikes law in this case would be cruel and unusual punishment. However, for the guidance of the trial court on remand, we note that the severe penalty imposed on Cluff appears disproportionate by any measure. The nature of Cluff's current offense did not demonstrate recidivist tendencies toward child molestation. While there is no requirement that a third strike be a serious or violent felony, neither the Legislature nor the voters intended the Three Strikes law to be used as a nuisance statute to rid society forever of persons who fail to meet technical requirements to confirm an accurate registration.

On remand, the trial court should keep in mind that "a decision to strike a prior is to be an individualized one based on the particular aspects of the current offenses for which the defendant has been convicted and on the defendant's own history and personal circumstances. This approach allows the court to perform its obligation to tailor a given sentence to suit the individual defendant. But the court must also be mindful of the sentencing scheme within which it exercises its authority. In deciding to strike a prior, a sentencing court is concluding that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme." (*People v. McGlothin* (1998) 67 Cal.App.4th 468, 474.)

On this record, there are strong arguments that Cluff should be treated as though he fell outside the Three Strikes scheme.[13] In addition to the factors discussed above, we note that none of the circumstances in aggravation listed in the California Rules of Court appear to apply here (Cal. Rules of Court, rule 4.421), while some circumstances in

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13 Both sides, of course, are free to present additional relevant, admissible evidence when the matter returns to the trial court for resentencing.

mitigation may apply (see, e.g., Cal Rules of Court, rules 4.423(a)(1), 4.423(a)(6), 4.423(a)(7), 4.423(b)(6)). The court should consider all of these factors in exercising its discretion to strike one or more of the prior convictions.

H. Habeas Issues.

We previously consolidated Cluff's related petition for writ of habeas corpus with this appeal. We have reviewed the petition for writ of habeas corpus, and conclude Cluff has failed to make out a prima facie case for relief. We therefore summarily deny the petition.

An appellate court receiving a petition for writ of habeas corpus must first ask whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. If petitioner does not state a prima facie case for relief, the court will summarily deny the petition. If, however, the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an order to show cause. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.)

Cluff makes two relevant claims of ineffective assistance in his petition for writ of habeas corpus. The facts he alleges do not, in our view, warrant relief.

In order to prevail on a claim of ineffective assistance of counsel the defendant must show counsel's representation was so deficient that it fell below an objective standard of reasonableness under prevailing professional norms. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215; *People v. Walker* (1993) 14 Cal.App.4th 1615, 1623.) In addition, the defendant must establish prejudice by showing there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been more favorable to the defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-696.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*In re Sixto* (1989) 48 Cal.3d 1247, 1257.) The defendant has the burden to establish such a "reasonable probability" by a preponderance of the evidence. (*People v. Ledesma*, *supra*, 43 Cal.3d at p. 218.)

A. Counsel's Advice that Cluff Not Testify.

According to the writ petition, defense counsel advised Cluff not to testify because, if he did, he might be impeached with the statement in his OICW application that he was not an offender. Cluff claims this was unsound advice that did not meet prevailing professional norms. We disagree.

The type of decision Cluff attacks is precisely the type of decision that rests within counsel's broad discretion. A reviewing court must be highly deferential in scrutinizing trial counsel's performance. (*People v. Lewis* (1990) 50 Cal.3d 262, 288.) Because of the difficulties inherent in making an evaluation of trial counsel, a reviewing court must indulge the presumption that trial counsel's performance comes within the wide range of reasonable professional assistance and that actions taken in defense of the accused were a matter of sound trial strategy. (*Ibid.*) Unless there can be no satisfactory explanation for counsel's actions the case is generally affirmed on appeal. (*People v. Ledesma, supra*, 43 Cal.3d at p. 218.) When a petitioner raises the issue in a petition for writ of habeas corpus the burden is on the petitioner to establish that counsel's performance was deficient. (*People v. Duvall, supra,* 9 Cal.4th at pp. 474-475.) Conclusory allegations do not warrant relief. (*Ibid.*)

Here, there is a satisfactory explanation for counsel's decision: she believed the risk of testifying outweighed the benefit. Indeed, given the weight the trial court later attached to the misstatement in the application, it was probably the correct decision. Cluff has not shown that counsel's performance on this score fell below prevailing professional norms.

B. Evidence Regarding Dyslexia.

Cluff next contends his counsel was ineffective because she failed to research and present evidence showing that he had dyslexia. According to Cluff, such evidence is relevant because it would prove he was unable to read the notice he was shown in 1995 outlining the new annual "updating" requirement.

However, even assuming such evidence should have been admitted[14] we do not believe it would have changed the result in this case. The trial judge, who was the factfinder, clearly believed Cluff was dissembling when he claimed he was unaware of the annual registration requirement. In our view, evidence regarding Cluff's supposed "dyslexia" would not have changed the court's mind on this issue. In other words, the failure to introduce evidence regarding Cluff's supposed dyslexia is not sufficient to undermine our confidence in the outcome of the case.

III

DISPOSITION

The petition for writ of habeas corpus is denied. The sentence is vacated and the matter is remanded to the trial court to conduct a new *Romero* hearing. In all other respects, the judgment is affirmed.

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Parrilli, J.

We concur:

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Corrigan, Acting P. J.

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Walker, J.

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14 We note that the evidence consists primarily of Cluff's self-serving statements, his self-serving answers to dyslexia "assessment" tests, and the statements of his relatives.

Trial Court:	San Mateo County Superior Court
Trial Judge:	Hon. George A. Miram
Counsel for Appellant:	Richard Such, First District Appellate Project
Counsel for Respondent:	Bill Lockyer, Attorney General; David P. Druliner, Chief Assistant Attorney General; Ronald A. Bass, Senior Assistant Attorney General; Laurence K. Sullivan Supervising Deputy Attorney General; Rene A. Chacon, Supervising Deputy Attorney General

People v. Alan Ross Cluff, A086125 and *In re Alan Ross Cluff,* A090342